STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA BROWN,

Plaintiff-Appellant,

v

ALTERRA HEALTHCARE CORPORATION,

Defendant-Appellee.

UNPUBLISHED
May 12, 2009

No. 281352
Genesee Circuit Court
LC No. 06-085154-NO

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant in this premises liability case. We affirm.

Plaintiff slipped and fell on a patch of ice on the sidewalk outside defendant's facility, sustaining injuries to her shoulder. On appeal, plaintiff argues that summary disposition was improperly granted because discovery was incomplete, there were genuine issues of material fact regarding whether the ice that plaintiff slipped on was an open and obvious condition as well as unreasonably dangerous, and whether defendant's premises created a public nuisance in fact. We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 56; 744 NW2d 174 (2007). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must review the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Cowles v Bank West*, 476 Mich 1, 32; 719 NW2d 94 (2006).

First, plaintiff argues that, if permitted an opportunity to obtain depositions from defendant's employees, that discovery would provide necessary factual information about the disputed issues regarding whether defendant could have taken reasonable steps to insure that water would not be channeled directly onto the sidewalk. Plaintiff contends that, without having an opportunity to obtain this evidence, summary disposition was premature. We disagree.

"The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law." *Shepherd Montessori Ctr Milan v Ann Arbor Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003). Summary disposition is premature if granted before discovery on a disputed issue is complete, but summary disposition may be appropriate if further discovery does not present a reasonable chance of uncovering factual support for the opposing party's position. *Stringwell v Ann Arbor Public School Dist*, 262 Mich App 709, 714; 686 NW2d 825 (2004).

Plaintiff seeks the depositions of defendant's employees, but the information she seeks would not provide further factual support for her position with regard to summary disposition. The first issue raised by defendant in its motion for summary disposition was that the condition was open and obvious. Further information about snow removal procedures, as well as the drainage system and roof, would not provide insight into whether the condition was open and obvious or unavoidable, thus making it unreasonably dangerous. Also, whether the condition is open and obvious has nothing to do with whether defendant could have done anything differently to remedy the condition. Moreover, additional discovery would have no bearing when summary disposition concerned whether the current setup and design of defendant's premises even met the threshold requirements of a public nuisance.

Plaintiff submitted a detailed report from an expert providing support for her claims about the structural problems with defendant's roof and drainage system. Plaintiff was not prejudiced by the lack of discovery because summary disposition was not decided based on a lack of evidence from plaintiff; instead, it was decided based on the law governing premises liability. Because these issues were resolved as a matter of law, the trial court's decision was not premature. *Mackey v Dep't Corrections*, 205 Mich App 330, 334; 517 NW2d 303 (1994).

Next, plaintiff argues that the icy condition was not open and obvious because the average person of ordinary intelligence would not have been able to discover the risk presented upon casual inspection. Plaintiff argues that she was walking on an area of the sidewalk that appeared to be clear, it was not snowing at the time the incident occurred, and she did not see any ice. Plaintiff also argues that, even if the condition is considered open and obvious, the ice presented special aspects because it was effectively unavoidable. Plaintiff contends that the sidewalk she fell on was the only means of ingress and egress to the back of the facility. We disagree.

In a premises liability action, the plaintiff must prove the four elements of negligence: (1) that the defendant had a duty to the plaintiff, (2) the defendant breached that duty, (3) the breach proximately caused an injury, and (4) the plaintiff suffered damages as a result. *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000). An invitor has a common law duty to exercise reasonable care to warn or protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech*, 464 Mich 512, 516; 629 NW2d 384 (2001). It is undisputed that plaintiff is an invitee in this case.

The basic duty to warn or protect an invitee does not generally include removal of open and obvious dangers: "[w]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 3; 649 NW2d 392 (2002), quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). The open and obvious doctrine is not an exception to the duty owed to invitees, but instead is "an integral part of the definition of that duty." *Lugo*, *supra* at 516. A danger is open and obvious if "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection[.]'" *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 713; 737 NW2d 179 (2007), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Generally, absent special circumstances, the hazards presented by snow and ice are open and obvious. *Corey*, *supra* at 5-6. However, black ice, without evidence that it would have been visible on causal inspection or without other indicia that there is a potentially hazardous condition, is not open and obvious as a matter of law. *Slaughter v Blarney Castle Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008). The test is objective, meaning a court does not consider whether a particular plaintiff should have known that the condition was hazardous, but whether a reasonable person in that position would have foreseen the danger. *Corey, supra* at 5.

If there are special aspects of an open and obvious condition that make the condition unreasonably dangerous then the possessor of the premises retains the duty to undertake reasonable precautions to protect invitees from that danger. *Mann v Shusteric Enterprises*, 470 Mich 320, 328-329, 331; 683 NW2d 573 (2004). In determining whether a condition presents a special aspect, a court must consider whether the open and obvious condition is effectively unavoidable and thus presents a high likelihood of harm or presents a high risk of severe harm. *Lugo, supra* at 518. This determination must be based on the nature of the condition at issue, and not on the degree of care used by the invitee. *Id*. at 523-524. The *Lugo* Court provided two examples of situations that might involve special aspects and present an unreasonable risk of harm despite their open and obvious character: a commercial building with only one exit for the general public where the floor is covered with standing water, and an unguarded 30 foot deep pit in the middle of a parking lot. *Id*. at 518.

Here, it is undisputed that the incident occurred in late January in Michigan. Plaintiff fell in broad daylight around 10:00 a.m. and admitted visibility was not a problem. Plaintiff's husband took photographs of the sidewalk where the incident took place the following day. Plaintiff admitted that these photographs depicted where she fell and that the sidewalk in the photographs appeared the same to her at the time of her fall.

The average person would have been able to discover the icy condition and the risk it presented. Plaintiff fell at a time when visibility was not an issue and there was nothing obscuring the sidewalk. Moreover, shown in the photographs are snow piles lining the sidewalk. Plaintiff testified that she did not see any difference from what she saw the day of the incident and what the pictures showed. Reasonable Michigan winter weather residents are aware that ice may form beneath or near snow and places a person on notice of slippery conditions. *Slaughter, supra* at 479-480. During the middle of winter in Michigan, the fact that there is snow adjacent to the sidewalk puts the average person on notice that there may be slippery conditions.

Additionally, the icy spots also show up in the pictures significantly darker than the sidewalk itself, which provides further indication of wet and slippery conditions. Moreover, the ice indicated that it was a potentially hazardous condition and would have been visible upon casual inspection. *Id*. Again, there was snow lining the sidewalk and the icy spots were darker then the sidewalk itself. The clear visibility, the snow piled up, and the dark shading of the sidewalk all show that the condition was open and obvious.

Additionally, the icy sidewalk did not present a high likelihood of harm because it was not effectively unavoidable. Plaintiff's deposition testimony established that this was not the only way to get to the back of the facility. Moreover, there was nothing preventing plaintiff from stepping off the sidewalk to get around the ice. Additionally, the ice did not present a high risk of severe harm. It merely presented the harm that all ice presents, which is the potential to slip and fall.

Lastly, plaintiff argues that defendant has created a nuisance in the design of the roof and the drainage system, which will continue to create the hazard of icy patches on the sidewalk. We disagree.

A public nuisance is an unreasonable interference with a common right enjoyed by the general public. Unreasonable interference "includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). "A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public." *Id*.

In this case, there is no evidence the resulting patches of ice significantly interfere with public health and safety. Next, any issues that it creates are not permanent or long lasting. The hazard would generally only appear in the winter when the temperature and precipitation aligned to make icy conditions possible. Also, the condition is completely avoidable because a person could step off the sidewalk to avoid the ice. Moreover, as the trial court found, plaintiff provided no evidence that she suffered a type of harm different from that of the general public. A patch of ice on the sidewalk presents the danger of slipping and falling. This is what happened to plaintiff, and there is no suggestion that the general public would face a different type of danger. Therefore, the trial court did not err by granting summary disposition of plaintiff's public nuisance in fact claim.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood